Pacific Basin*

I. Australia

A. Foreign Banks' Representatives Offices

Instead of either incorporating a local subsidiary company or registering a branch in Australia, a foreign bank may establish a representative office for promotional and liaison activities. Prior to the *Credit Suisse* decision (discussed below), it was widely believed that if a representative office of a foreign bank merely undertook a purely liaison role, in accordance with its approval from the Treasurer, it was not necessary for the foreign bank to register as a foreign company under the Companies Code. Registration entails the filing of annual returns and other documentation, and there may be practical difficulties with such registration (especially with the use of the word "bank").

In the recent case of *Anglo Australian Foods v. Credit Suisse*,[1] however, the Western Australian Supreme Court held that a representative office was carrying on a business within the meaning of section 512 of the Companies Code. Section 512 provides that: "A foreign company shall not establish a place of business, or commence to carry on business, within the State unless it is registered under this Division." After examination of the activities of Credit Suisse in Melbourne, the Court held that the company's activities constituted the carrying on of a business.

The decision in the *Credit Suisse* case should cause a reconsideration of the widely held assumption that representative offices are automatically outside the ambit of the Companies Code for registration purposes. Each case should be examined on the facts, and it may still be possible to establish a representative office that does not constitute carrying on a business in Australia for the purposes of the Companies Code.

The other implication of the case is the possible treatment of a representative office as a permanent establishment in Australia for tax purposes, so that the business profits of the foreign bank attributable to that permanent establishment will be liable to Australian corporate tax.

B. First Demand Guarantees: Payment Refused

First demand bank guarantees are widely used in both domestic and international transactions. They are used primarily by a buyer of goods (the beneficiary) as a form of security against a seller's default in performing contractual

*Prepared by Alex Chin Guan Lee and Anjana Bahl of Baker & McKenzie, Chicago, Illinois, in cooperation with the firm's offices in the Pacific Basin.

1. Judgment of the Supreme Court of Western Australia delivered on Nov. 18, 1988 (unreported).

obligations. The law has developed to ensure that the beneficiary of such guarantees can collect payment without having to prove default in the underlying contract and as such are of great use to a beneficiary. There have been several cases where a seller (the account party) has attempted to enjoin the making or collecting of such payment upon demand but the seller has invariably failed to obtain relief.[2]

An interesting exception to the courts' approach emerged recently in the case of *Wood Hall Ltd. v. The Pipeline Authority.*[3] The majority of the High Court of Australia, while not denying the right of the beneficiary to claim payment on the guarantee, left open the possibility that, as between the account party and the beneficiary, the rights of the beneficiary to call on the guarantee could be restricted by the main contract.

Accordingly, in *Selvas Pty. Ltd. v. Hansen & Yuncken (SA) Pty. Ltd.*,[4] a term in the underlying contract stipulated that the security provided should only be available to the beneficiary on default by the account party. An injunction was granted prohibiting the beneficiary from calling on the bank guarantee in the absence of a showing that the account party was in default. A similar result was reached in *Pearson Bridge (NSW) Pty. Ltd. v. State Rail Authority of NSW.*[5]

II. Taiwan

A. High Technology Incentives

The Statute for the Establishment and Management of a Science-based Industrial Park was revised on May 24, 1989, to provide high technology investors with a supportive environment as well as liberal tax incentives for research, development, and manufacturing in Taiwan. The Statute continues the grant of a five-year tax holiday for any new entity in the Park, and a four-year tax holiday for any income generated from an approved expansion plan. The revisions include the following:

(a) branches of foreign companies can now be established in the Park;
(b) the maximum corporate income tax has been reduced from 22 percent to 20 percent following any tax holiday period; and
(c) a 20 percent withholding tax on the repatriation of after-tax earnings from a branch to its head office.

The above revisions are aimed at attracting foreign corporate investors to establish branch offices in the Park rather than subsidiaries or any other form of business entity outside the Park.

2. See, for example, the Hong Kong case of Guangdong Transport Ltd. v. Ancora Transport N.V., [1987] HKLR 923, *discussed in* 23 Int'l Law. 566–67 (1989).
3. (1979) 141 C.L.R. 443.
4. Unreported.
5. Judgment of the Supreme Court of New South Wales delivered June 28, 1982 (unreported).

III. People's Republic of China

A. Coastal Open Economic Zones

Preferential customs treatment is now extended to the Coastal Open Economic Zones (COEZs) effective from April 1, 1989. Previously the preferential treatment was given only to the Economic and Technical Development Zones. The COEZs cover the urban districts of the original fourteen coastal open port cities, as well as other cities and regions that were recently granted COEZ status. They include the Yangtze Delta, the Minan and Xiazhangquan Deltas, the Pearl River Delta, the Jiadong Peninsula, the Liaodong Peninsula, and certain rural areas developing agricultural industry. Significant provisions include the following:

(a) exemptions from custom duties, value added tax, products tax, and Consolidated Industrial and Commercial Tax for the import of various goods and materials into the COEZs;
(b) bonded warehouses or bonded factories may be established by qualified enterprises with approval of the customs authorities;
(c) foreign trade enterprises and production enterprises that are located in the COEZs and that engage in the importing and exporting of goods must register with the customs authorities;
(d) consignees and consignors of imports and exports from the COEZs, or their agents, must complete customs declaration forms;
(e) exports of products not otherwise subject to export restrictions are exempt from export duties and tax; and
(f) exemptions are granted from custom duties and tax for imported office supplies and transport vehicles for permanent offices established by foreign enterprises.

B. Shanghai Joint Venture and Central Planning Considerations

The Shanghai Municipality has recently clarified the extent to which raw material allocation and sales distribution controls apply to foreign investment enterprises.

1. *Raw Materials*

As of July 1, 1989, foreign investment enterprises are required to obtain their raw materials from the following specified sources in the Municipality: (a) the Municipal Foreign Investment Enterprise Materials Services Company; (b) units engaged in the materials business; (c) foreign trade companies; (d) enterprises engaged in materials production; (e) bonded warehouses; or (f) commodity fairs and trading centers. The measures:

(a) stipulate that suppliers should give priority to export-oriented and technologically advanced foreign investment enterprises;
(b) provide that the supply of materials needed by foreign investment enterprises under production plans or purchasing contracts is the responsibility of the departments that make the plans and place the orders;

(c) make access to materials subject to allocation plans a valuable asset that Chinese parties may contribute to joint ventures; and

(d) provide that the materials that would have been supplied by the Chinese parties to foreign investment enterprises in accordance with the original plan, except for those materials that are expressly excluded from the materials supply plan by the approval document, must be supplied in accordance with the plan. The relevant departments are exhorted to preserve the Chinese investor's materials supply channels in accordance with its participation in the investment.

The foreign investment enterprises may now establish jointly managed enterprises with other domestic enterprises in order to supply materials related to production in their own enterprises. The existing right of foreign investment enterprises to import directly the materials they require is also confirmed, as long as such materials are specifically required for the production activities stated in the enterprises' scope of business.

2. *Sales*

The measures also reiterate Shanghai's policy of requiring foreign investment enterprises to export their products. Approval is only given for domestic sales if products are in urgent demand in the local market.

If foreign investment enterprises are engaged in the production of products subject to planned allocation, then their products must be sold to designated customers. If the products are an important means of industrial production, they must either be sold by means of production markets in large and medium-sized cities or sold to officially designated state enterprises. Approval by the Shanghai Municipality Commission for Foreign Economic Relations and Trade is required before foreign investment enterprises may establish offshore branches to obtain raw materials or to market their products.

IV. Philippines

A. Debt Rescheduling Guidelines

Following the rescheduling and consolidation agreement reached by the Philippine government on May 26, 1989, with representatives of creditor countries participating in the Paris Club, new guidelines on the rescheduling of Philippine debts have been issued by the Monetary Board of the Philippines. The rescheduling is to be on the following basis:

(a) amounts due and unpaid as of May 31, 1989, are to be paid by equal and successive semiannual payments. The first payment is to be made on May 31, 1994, and the final payment on November 30, 1997; and

(b) for amounts due from June 1, 1989, to June 30, 1991, 100 percent of the principal and 75 percent of the interest is to be paid in eight equal and successive semiannual payments. The first payment is to be made on December 31, 1996, and the final payment on June 30, 2000. The remaining

25 percent of the interest will be paid in two installments— 10 percent on June 10, 1991, and 15 percent on June 30, 1992.

The above does not apply to creditor countries with principal and interest aggregating less than SDR 1 million falling due during the consolidation period. In such cases payments will be made on the original due dates.

Borrowers with loans subject to Paris Club rescheduling are required to deposit with the Central Bank of the Philippines the peso equivalent of the principal and interest due on their loans under the following schedules:

(a) for maturities still unpaid as of May 31, 1989, the deposit should have been made on or before June 30, 1989; and

(b) for maturities due from June 1, 1989, to June 30, 1991, the deposit should be made on the original due date.

Debts in connection with the nuclear power plant budget and obligations of government financial institutions assumed by the National Government are exempt from this requirement.

V. Malaysia

A. Relaxation of Policy on Equity Ownership

In July 1988, the Ministry of Trade and Industry (MTI) relaxed its policy on equity ownership of manufacturing companies licensed under the Industrial Co-ordination Act of 1975 (ICA).

Under the ICA, any company having shareholders' funds of M$2.5 million (approximately U.S. $930,000) or more, employing seventy-five or more full-time paid employees and wishing to engage in manufacturing activities, must apply for and obtain a manufacturing license from the MTI. The license may stipulate a minimum local equity ownership in the company. In the past, the MTI has allowed foreigners to hold up to 100 percent of the equity of a manufacturing company provided that such company exports 80 percent or more of its products. For products that do not compete with those currently manufactured locally for the domestic market, foreigners may also hold up to 100 percent of the equity in a company provided that the company exports 50 percent or more of its products or employs 350 or more full-time Malaysian workers.

Companies that export less than 20 percent, between 20 percent to 50 percent, or between 51 percent to 75 percent of their products may be allowed to have foreign equity ownership up to 30 percent, 51 percent, and 79 percent, respectively. In these situations, MTI will consider the level of technology involved, the spin-off effects, the size of the investment, the location, the value added, and the utilization of local raw materials and components. Companies utilizing high technology to produce their products or produce priority products for the domestic market may have foreign equity ownership up to 51 percent.

The MTI has now decided that licensed manufacturing companies approved before December 31, 1990, which export at least 20 percent of their products, may be wholly owned by foreign interests for a five-year period provided that no local person is interested in participating in such manufacturing. After the five-year period, the equity in the manufacturing company would have to be restructured. The permitted percentage of foreign ownership after such restructuring would be dependent upon the percentage of the manufactured goods being exported.

B. New Banking and Finance Legislation

The Banking and Financial Institutions Act 1989 (the Act) was recently passed as a response to the fraud, mismanagement, and institutional failures that have occurred in banks and financial institutions during recent years. The main features of the Act are:

(a) persons carrying on the business of banking, finance, merchant banking or that of a discount house must be public companies, and incorporated in Malaysia;

(b) branch offices of Malaysia's sixteen foreign banks are to be incorporated locally within five years of the Act's coming into force; this period may be extended, but in principle failure to incorporate will result in the revocation of any existing license;

(c) persons involved in the following businesses must report to the Central Bank of Malaysia and pay fees that may be prescribed by the Minister of Finance: (i) representative offices of foreign banks; (ii) building credit businesses; (iii) credit token businesses; (iv) development finance businesses; (v) factoring businesses; and (vi) leasing businesses;

(d) wide powers are given to the Central Bank to appoint persons to advise licensed institutions, particularly where the Central Bank is satisfied that the licensed institution is carrying on its business in a manner detrimental to the interest of its depositors, its creditors, or the public in general;

(e) the Central Bank is given wide powers of investigation, search, and seizure, and greater supervisory control over the implementation and licensing of electronic banking;

(f) the licenses of financial institutions can be revoked by the Minister of Finance; and

(g) the maximum fine for white-collar crimes has been increased to M$10 million (approximately U.S. $3,703,703.70) and the maximum term of imprisonment has been increased to ten years.

To maintain public confidence in the financial system, branches and representative offices of foreign banks together with local financial institutions are now placed under greater surveillance.

Another major feature of the Act is its confirmation of the Malaysian courts' decisions as to the validity of contracts, agreements, or arrangements made in contravention of the previous Banking Act. The Act will not invalidate such